No. 89-865

In The

Supreme Court of the United States

October Term, 1989

MYRNA TRICKEY,

Petitioner,

v.

LARRY COFFMAN,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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ADDITIONAL STATUTORY PROVISION

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

A. FACTS

Respondent Larry Coffman is an inmate at the Missouri Eastern Correctional Center ("MECC") in Pacific, Missouri. Coffman has been incarcerated at MECC since December, 1985. He is serving three five-year sentences for sodomy.

Petitioner Myrna Trickey was at all pertinent times the Superintendent of MECC and, as such, a Missouri state employee.

On May 3, 1986, Correctional Officer William Arledge lodged a conduct violation charge against Coffman for allegedly violating published MECC rules. The conduct for which Coffman was charged consisted of standing silently in the prison's exercise yard; looking at an acquaintance, Wilma Smith, who was in a church parking lot on the other side of the prison fences; and waving to her as she drove away.

At the time of the incident, Coffman and Smith were separated by a distance of approximately 100 yards. Between them were two 16 foot tall chain link fences, one of which was topped with razor wire and the other of which was topped with barbed wire. Also, a guard tower was almost directly between Coffman and Smith.

In a telephone conversation the previous day, Coffman and Smith had discussed the timing of when Coffman would be in the exercise yard. At the time of the incident, Coffman had a perfect right to be where he was and Smith had a perfect right to be where she was. Coffman had no knowledge of any rule prohibiting what

he had done. In fact, he had seen other inmates do the same thing without sanction.

Coffman was charged with violating Rule 29 of the Missouri Division of Adult Institution Rules, which prohibits: "Knowingly failing to abide by any published rule." Upon being charged, Coffman immediately was placed in administrative segregation and was kept there for approximately four hours. Subsequently, Coffman was brought before a Disciplinary Committee and an Adjustment Board and found guilty of the charge. As a result, by order of Trickey, Coffman was placed in the MECC's Special Adjustment Unit. Coffman remained confined in the Special Adjustment Unit for 90 days.[1]

Coffman suffered severe restrictions on his liberty and other adverse consequences as a result of his placement in the Special Adjustment Unit. For one thing, the Special Adjustment Unit is located in its own wing and is locked off and, thus, segregated from the rest of the institution. Coffman was moved there from his normal room. Also, in contrast to inmates in the general prison population who largely enjoy free movement within the institution and wear normal clothing, Coffman, while in the Special Adjustment Unit, was required to remain in his cell during the week; was required to wear a heavy

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[1] Part of the basis given for Coffman's placement in the Special Adjustment Unit was that he had been given three other conduct violations during the preceding several months. The conduct underlying those violations involved taking two pieces of chicken from the kitchen, visiting another inmate's room during the inmate count and smoking in a no-smoking area. Coffman was sanctioned for these incidents at the time they occurred.

jumpsuit at all times, even on extremely hot days; and was denied the same access as other inmates normally have to opportunities for recreation, education, work, visits, and use of the prison law library. In his trial testimony, Coffman characterized the Special Adjustment Unit as a prison within a prison.

Further, Coffman's being found guilty of the charge and his resulting confinement in the Special Adjustment Unit have become part of his permanent prison record, and may adversely affect his chances for parole and his eligibility for transfers and other favorable treatment within the Missouri penal system.

The MECC does not have any published institutional rule proscribing the conduct for which Plaintiff was punished. Significantly, the MECC does have a written rule which provides:

> (3) All residents received at Missouri Eastern Correctional Center will be advised in writing of his rights and responsibilities, conduct prohibited at this institution, and disciplinary sanctions which may be taken for misconduct of violation of same. * * *

A Missouri statute limits the period for which a prison inmate may be confined to an adjustment unit on grounds of a rules violation to 10 days. R.S. Mo. §217.375.1:

> An inmate who has violated any rule or regulation of the division or institution relating to the conduct of inmates may, after proper hearing and upon order of the chief administrative officer of the institution, be confined in an adjustment unit for a period not to exceed ten days.

B. PROCEDURAL BACKGROUND

Coffman initiated this case *pro se* in July, 1986, under 42 U.S.C. §1983. Thereafter, the undersigned counsel was appointed to represent him. The parties consented to a trial before a United States Magistrate, and the case was tried to a jury in September, 1988.[2]

At trial, Coffman pursued two distinct claims, both of which were grounded in deprivations of due process. Coffman claimed, first, that he had been deprived of due process by being subjected to punishment for conduct as to which, before he acted, he had no fair notice and warning was proscribed. Second, Coffman asserted that he was further denied due process in that his punishment exceeded the statutory maximum prescribed for the conduct in question.

The jury rendered a verdict for Petitioner Trickey on September 8, 1988, and judgment was entered in her favor the same day. Coffman appealed to the Eighth Circuit, and the undersigned was appointed to also represent him in connection with the appeal.

On appeal, the U.S. Court of Appeals for the Eighth Circuit reversed and remanded for a new trial. The Court

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[2] This case was originally brought against two defendants, Myrna Trickey and William Arledge; however, Plaintiff voluntarily dismissed his claims against Defendant Arledge prior to trial. Also, in August, 1987, Plaintiff filed a second civil rights action, *Larry Coffman v. Myrna Trickey, et al.*, E.D. Mo., No. 87-1630(C)(1), and by Order dated March 23, 1988, the two cases were consolidated. Plaintiff, however, voluntarily dismissed Case No. 87-1630(C)(1) prior to trial.

held that the trial court should have granted Coffman's motion for a directed verdict on his claim that he was deprived of liberty without due process when Trickey punished him for conduct that was not proscribed. The Court further held that R.S. Mo. §217.375.1 limits confinement in the MECC Special Adjustment Unit to 10 days, as Coffman had maintained, but also held that Trickey was entitled to qualified immunity on Coffman's claim in that regard as a matter of law.[3]

Trickey's petition for rehearing en banc was denied; and, prior to any proceedings on remand, Trickey sought certiorari.

SUMMARY OF ARGUMENT

Trickey's contention that the Court of Appeals' holding with respect to R.S. Mo. §217.375.1 runs afoul of the Eleventh Amendment is incorrect as a matter of law since the crux of Coffman's claim was a violation of federal, not state law, and the relief sought was damages against Trickey in her individual capacity and equitable relief against the continuing effects of a violation of federal law.

Moreover, even were this Court to question the correctness of the challenged holding, this case is not appropriate for certiorari since the holding may be viewed as

[3] In a further holding not relevant to Trickey's present petition, the Court of Appeals held that the trial court erred in including an intent element when it instructed the jury on the requisite showing necessary to make out a constitutional violation.

dictum, Trickey raised the issue in the Court of Appeals belatedly, and, at most, Trickey is seeking mere error correction.

ARGUMENT

A. Trickey's Contention that the Court of Appeals' Holding Regarding R.S. Mo. §217.375.1 Runs Afoul of the Eleventh Amendment Is Incorrect as a Matter of Law

Trickey contends that the Eighth Circuit Court of Appeals violated the Eleventh Amendment in holding that her confinement of Coffman in the MECC Special Adjustment Unit for 90 days violated the 10 day limit on adjustment unit confinement set forth in R.S. Mo. §217.375.1. This contention, however, is incorrect as a matter of law.

Coffman did not pursue any state law claims in this case. The context in which the lower courts were called upon to decide whether Coffman's adjustment unit confinement exceeded the statutory limit was a claim for deprivation of due process under 42 U.S.C. §1983 and the Fourteenth Amendment. Coffman contended that he was subjected to punishment which exceeded the legal maximum for the offense in question, and thereby was denied due process under the teachings of *Hicks v. Oklahoma*, 447 U.S. 343 (1980). (See pp. 10-13 of the Appellant's Brief filed in this case in the Eighth Circuit, reproduced in the Appendix to this Brief.) Insofar as the Eighth Circuit characterized the claim as one resting on state rather than

federal law, it was due to an incorrect and unfortunate choice of words.

We note that, notwithstanding the Eighth Circuit's choice of words, it is not at all clear that the Court of Appeals, in fact, regarded the claim as one turning on state rather than federal law. The Court of Appeals proceeded to take up Trickey's asserted immunity defense and ultimately sustained it as a matter of law, applying the qualified immunity test articulated in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). If Coffman's claim were regarded as one turning on state law, the appropriate immunity test would have been the absolute immunity test discussed in *Barr v. Mateo*, 360 U.S. 564 (1959). *See, e.g., Shannon v. Recording Industry Association of America*, 661 F. Supp. 205, 212 (S.D. Ohio 1987). The fact that the Court of Appeals applied the *Harlow* test suggests that it recognized Coffman's claim as a federal claim.

Viewing the claim in question as a federal law claim, Trickey's Eleventh Amendment argument rapidly begins to crumble. It is well settled that the Eleventh Amendment begins to fade from the picture when the claim is grounded in federal rather than state law. *See, e.g., Papsan v. Allain*, 478 U.S. 265, 276-77 (1986); *Ex parte Young*, 209 U.S. 123 (1908). Moreover, the Eleventh Amendment evaporates from the scene completely when the relief sought in vindication of a federal claim is either damages against a state official in his or her individual capacity, or injunctive relief to remedy ongoing violations of federal law. *Id.*

As noted, Coffman's claim in this case was grounded in federal, not state law. Moreover the remedies sought

were damages from Trickey in her individual capacity, and expungment to remedy the ongoing effects of the due process violation. Accordingly, this case falls squarely outside the proscriptions of the Eleventh Amendment.

B. Certiorari is Inappropriate for Other Reasons As Well.

Even were this Court to question the correctness of the Eighth Circuit's decision, there are a number of other considerations which make certiorari inappropriate.

For one thing, the Eighth Circuit went on to hold that Trickey was immune from liability on the claim in question. Accordingly, the challenged holding regarding R.S. Mo. §217.375.1 may be regarded as dictum.

Further, Trickey's petition may be regarded as premature since the Eighth Circuit's decision contemplates proceedings on remand, and the decision sought to be reviewed, therefore, is not a final disposition.

In addition, Trickey raised her Eleventh Amendment contention at the Court of Appeals level only in her petition for rehearing; no mention of it was made in her brief on appeal. While this factor may not absolutely bar the present petition, it does serve to weaken her position in this Court. *See, City of Houston, Texas v. Hill*, 107 S. Ct. 2502, 2512 (1987).

Finally, we submit that the petition, at most, presents an effort to obtain simple error correction and does not square with the considerations governing review on certiorari set forth in Supreme Court Rule 17.

CONCLUSION

For all of the foregoing reasons, we respectfully submit that the petition for certiorari should be denied.

Respectfully submitted,

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IN THE
UNITED STATES COURT OF APPEALS
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No. 88-2520-EM
CIVIL

LARRY COFFMAN,

Plaintiff/Appellant,

v.

MYRNA TRICKEY,

Defendant/Appellee.

Appeal from the
United States District Court for the
Eastern District of Missouri,
Eastern Division

APPELLANT'S BRIEF

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* * *

III. THE TRIAL COURT ERRED IN REFUSING TO DIRECT A VERDICT FOR PLAINTIFF AS TO LIABILITY ON THE BASIS THAT HIS CONFINEMENT IN THE SPECIAL ADJUSTMENT UNIT FOR 90 DAYS VIOLATED R.S. MO. §217.375 AT A MATTER OF LAW.

One of the claims asserted by Plaintiff was that his confinement in the Special Adjustment Unit contravened due process in that it exceeded the maximum punishment prescribed by statute for the underlying conduct. *See, e.g., Hicks v. Oklahoma,* 447 U.S. 343 (1980). As discussed above, R.S. Mo. §217.375.1 limits to 10 days the period for which a prison inmate may be confined in an adjustment unit on grounds of a conduct violation. R.S. Mo. §217.150(1) defines "adjustment unit" to mean

> a cell for the segregation of inmates from the general population because the inmate has been found to have committed a violation of a division or institution rule and other available means are inadequate to regulate an inmate's behavior within acceptable limits.

Plaintiff moved for a directed verdict as to liability on this claim at the close of the Defendant's case and again at the close of all evidence. (Tr. Vol. II, p. 64) The Trial Court, however, denied the motion, ruling that whether Plaintiff's confinement in the Special Adjustment Unit was proscribed by the statute raised a jury question. (*Id.*) We submit that this ruling was erroneous and that the Trial Court should have directed a verdict for Plaintiff on liability.

The facts as to the nature and consequences of Plaintiff's confinement in the special Adjustment Unit were undisputed. The only issue present at trial was whether

the statute encompassed the Special Adjustment Unit. Since the facts were undisputed, the determinative issue must have been the proper meaning of the statute; and it is settled that the applicability of a statute's terms to undisputed facts is a question of law for the court. *See, e.g., Stissi v. Interstate and Ocean Transport*, 765 F.2d 370, 374 (2d Cir. 1985).

As to the proper interpretation of §217.375.1, perhaps the first rule of statutory construction is that the words of a statute should be accorded their plain and ordinary meaning. *See, e.g., United States v. Jones*, 811 F.2d 444, 447 (8th Cir. 1987); *Community Blood Bank v. F.T.C.*, 405 F.2d 1011, 1015 (8th Cir. 1969). By its terms, §217.375.1 applies to adjustment units. By its name, the place where Plaintiff was confined for 90 days undeniably was an adjustment unit. In fact, it was the only unit within the institution called an adjustment unit. (Tr. Vol. II, pp. 49-50) We note that it was Missouri officials, not Plaintiff, who designated the place where Plaintiff was confined as the "Special Adjustment Unit". (Tr. Vol. II, p. 50)

Consideration of R.S. Mo. §217.150, which defines an adjustment unit in terms of segregation of inmates from the general population, similarly buttresses the conclusion that the statute applies to the MECC Special Adjustment Unit. As discussed above, the Special Adjustment Unit is segregated from the rest of the prison, and inmates relegated there are confined to their rooms for the bulk of each week.

Defendant's sole argument at trial as to why §217.375.1 supposedly does not apply to the Special Adjustment Unit was that it also maintains an even more

onerous segregation unit and deems that unit subject to the statute. This argument, however, is unavailing. The fact that MECC has multiple types of adjustment units with different degrees of severity does not mean that the statute cannot be deemed to apply to more than one of them. Nothing in the statute suggests that it was intended to apply only to the most onerous system of punishment maintained at the institution. Significantly, both the Special Adjustment Unit and the MECC's more onerous segregation system are designed to achieve the same purpose – behavior modification. (Tr. Vol. II, pp. 41-43)

In sum, it is readily apparent that the Missouri legislature has mandated a 10 day time limit on confining a prisoner to an adjustment unit as a disciplinary measure. Of course, it is not the province of this Court to second-guess the legislature. Based on all of the foregoing, we submit that R.S. Mo. § 217.375.1 clearly applies to the MECC Special Adjustment Unit, and that the Trial Court should have directed a verdict for Plaintiff on that basis.

* * *